

SERVED: February 16, 2000

NTSB Order No. EA-4822

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of February, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15538
v.)	
)	
CORT M. LYBYER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, issued at the end of an evidentiary hearing held on May 14, 1999.¹ By that decision, the law judge affirmed the Administrator's

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

emergency order of revocation² of respondent's Mechanic Certificate for violating section 65.23(b), 14 CFR Part 65, of the Federal Aviation Regulations ("FARs").³ We deny the appeal.

The Administrator's complaint alleged that respondent, an employee at the time of US Airways, refused to submit to a required random drug test by adulterating his urine sample with soap. The law judge's attached initial decision provides a useful summary of the evidence presented at the hearing, so we note merely that the record indicates that respondent provided a urine sample, half that sample was then poured in his presence into another control vial or bottle, both vials were transported via appropriate chain of

² Respondent waived the expedited procedures applicable to an emergency order of revocation.

³ FAR § 65.23 provides, in relevant part, as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

* * * * *

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for--

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

custody procedures to an examining lab, and subsequent analysis of respondent's sample indicated a very high concentration of soap. Thereafter, the test was canceled, and the content of the control vial was not tested.

The law judge, who made credibility findings against respondent on crucial factual issues, found that the Administrator proved by a preponderance of the evidence that respondent adulterated his urine sample and, therefore, violated section 65.23(b) by refusing to take a required drug test.⁴

On appeal, respondent argues only that he has been denied due process because the "regulations do not require testing of the Bottle B split sample if Bottle A has adulterants in it," and asks that we remand his case for further proceedings after testing of the split sample. The Administrator notes that respondent's argument was not

⁴ Respondent claimed at the hearing that his hands had soap on them that may have adulterated his sample, but the law judge credited the testimony of the test technician that respondent washed his hands prior to the test and that they were clean and dry prior to the sample collection process. Respondent also claimed that the vial in the collection kit used for his sample had a small piece of cardboard in it, which the medical technician removed prior to the collection of his sample, and that this also may have been the source of the adulterant subsequently found in his sample. Again, however, the law judge credited the testimony of the medical technician that no such cardboard was observed in respondent's collection kit vial. Respondent does not contest the law judge's credibility findings. Moreover, the un rebutted expert testimony introduced by the Administrator indicated that respondent's sample contained concentrations of soap many times higher than concentrations measured in experiments designed to simulate inadvertent adulteration.

argued before the law judge, and correctly argues that we do not have jurisdiction to review the constitutionality of regulations issued by the Administrator or the Secretary of the Department of Transportation. See, e.g., Administrator v. Kralej, NTSB Order No. EA-4581 at 2 (1997) (citing Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972)) ("the Board lacks the authority to rule on the constitutional validity of regulations promulgated by the Administrator").⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's initial decision affirming the Administrator's emergency order of revocation is affirmed.

HALL, Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not participate.

⁵ We note, in any event, our view that respondent's complaint that the content of "bottle B," the control vial, was not tested appears to be meritless given the rationales respondent posits for how his sample came to be adulterated with soap. The only logical inference to be drawn from respondent's discredited assertions is that the adulterant was introduced to the entire sample prior to pouring half of it into a control vial and, therefore, he has not created any inference that testing the contents of the control vial would exonerate him.